No. 84-925 (4)

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

GENERAL MARINE TRANSPORT CORP.,

*Petitioner,*

—v.—

JOSEPH O'HARE, ALBERT M. CORNETTE, PETER GALE, BRUCE A. MCALLISTER, ROBERT W. SANDERS, THOMAS E. MORAN, as Trustees of the NEW YORK MARINE TOWING & TRANSPORTATION INDUSTRY PENSION FUND & INSURANCE FUND,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S SUPPLEMENTAL BRIEF

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**RECENT DECISIONS HAVE CREATED A CONFLICT AMONG THE CIRCUITS OVER APPLICATION OF *DEL COSTELLO*; THE THIRD AND NINTH CIRCUITS HOLD THAT THE SIX MONTH LIMITATIONS PERIOD IN NLRA § 10(b) APPLIES BROADLY, EVEN TO VIOLATIONS OF THE COLLECTIVE BARGAINING AGREEMENT ITSELF.**

New cases not available at the time the petition was filed have created a conflict among the circuits over application of

*Del Costello* v. *Teamsters,* 462 U.S. 151 (1983). In *Glover* v. *United Grocers, Inc.,* 746 F.2d 1380 (9th Cir. 1984), the Ninth Circuit stated:

> "We read *Del Costello* to apply not only when the gravamen of the action is breach of the duty of fair representation, but also to claims for alleged violations of the collective bargaining agreement." 746 F.2d at 1382.

The *Glover* decision—a § 301 breach of contract action brought by an employee against his employer—holds that the six month statute of limitations in § 10(b) barred the contract claim. In *Federation of Westinghouse Unions* v. *Westinghouse Electric Corp.,* 736 F.2d 896 (3rd Cir. 1984), a labor union brought a § 301 breach of contract action against an employer to compel arbitration of a dispute. The Third Circuit also held that the six month statute of limitations in § 10(b) barred the claim:

> "We hold that essentially for the same reasons relied on in *Del Costello* for borrowing section 10(b) as the statute of limitations in hybrid suits, that section should be borrowed for application to actions under section 301 to compel arbitration. Application of a six-year state statute of limitations streches out industrial disputes far longer than most recent cases have deemed desirable. Application of the extremely short Pennsylvania statute of limitations governing actions to confirm arbitration awards unnecessarily shortens the time during which parties to a collective bargaining agreement may, after exhaustion of in-house grievance steps, attempt an informal resolution of disputes. Moreover, grievances often involve an alleged activity which is also an unfair labor practice over which the National Labor Relations Board has jurisdiction . . . Thus it makes a great deal of sense to have a common statute of limitations for unfair labor practice charges and for suits to compel arbitration." 736 F.2d at 901 (Footnotes omitted).

Several months later, in *Local 1397* v. *Steelworkers,* ____ F.2d ____, Dkt. No. 84-3141 (3d Cir., Nov. 23, 1984), the Third Circuit, again relying on *Del Costello,* held that the six month statute of limitations in § 10(b) applied to an action under § 102 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 412:

> "[T]he federal labor policy in promoting stable bargaining relationships necessitates prompt resolution of disputes between an individual and his union or an individual and his employer, disputes that may affect the bargaining relationship between union and employer. This interest in prompt resolution, however, must be balanced in both situations agains the individual employee's legitimate interest in attacking what he believes to be an unfair action against him. Recognizing that Congress adopted a six-month limitations period as an appropriate balance between these considerations in the unfair labor practice context, the *Del Costello* court accepted that same balance for "hybrid" section 301 suits . . . [and] . . . suits brought under section 102 of the LMRDA do bear a 'family resemblance' to unfair labor practice charges. Cf. Del Costello, 103 S.Ct. at 2293 (finding a 'family resemblance' between unfair labor practice charges and breach of the duty of fair representation claims)." Lexis Slip. Op. at 5. (Footnotes omitted).

The contrast between the Second Circuit's holding below and the Ninth and Third Circuits' holdings—one saying that *Del Costello* applies only to hybrid § 301/unfair representation cases, and the others holding that *Del Costello* applies generally to § 301 actions and to any claim that bears a "family resemblance" to an unfair labor practice—is distressing to petitioner, whose employees work in both the Second and Third Circuits. In the Second Circuit, respondents are liable for $325,000 in a § 301 action, even though the identical claim is time barred in an NLRB proceeding. In the Third Circuit, the § 301 action is time barred as well.

The rule announced in *Del Costello* establishing a single six month statute of limitations was designed to eliminate such lack of uniformity and uncertainty about an employer's contractual liability. *Gould, Inc.* v. *Adams*, ____ U.S. ____, 53 U.S.L.W. 3478 (January 7, 1985) (denying cert.) (dissenting opinion). The Court should grant the writ to resolve the conflict and decide this important question involving the reach and application of *Del Costello*.

Dated: New York, New York
January 14, 1985

Respectfully submitted,

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*Attorney for Petitioner*